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## Making Rule 23 Ideal: Using a Multifactor Test to Evaluate the Admissibility of Evidence at Class Certification

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## NOTE

### MAKING RULE 23 IDEAL: USING A MULTIFACTOR TEST TO EVALUATE THE ADMISSIBILITY OF EVIDENCE AT CLASS CERTIFICATION

Cianan M. Lesley\*

*Circuit courts are split on whether and to what extent the Daubert standard should apply at class certification. Potential plaintiffs believe that application of Daubert would make it nearly impossible to obtain class certification. For potential defendants, the application of the standard is an important way to ensure that the certification process is fair. This Note examines the incentives underlying the push to apply the Daubert standard at class certification and the benefits and drawbacks associated with that proposal. It proposes a solution that balances the concerns of both plaintiffs and defendants by focusing on three factors: the obstacles to admissibility, the centrality of the evidence to certification, and the likelihood that evidence could evolve to an admissible state after full discovery. This standard could also be applied when admissibility concerns grounded in other provisions of the Federal Rules of Evidence are raised.*

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#### INTRODUCTION

The stories of the Walmart work environment for women are nothing short of disturbing. Dee Gunter, a former female employee at a Walmart store, detailed the pervasive discrimination she experienced as an employee.

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Men she trained, and who had less experience, were frequently promoted over her, and her supervisor sexually propositioned her. When she met with her district manager to discuss these experiences, she was fired.<sup>1</sup>

The company's employment data at the time reflected a troubling pattern: two-thirds of managers were men, despite two-thirds of employees being women.<sup>2</sup> Despite earning higher performance ratings, women were frequently paid less than men for the same tasks, and women were consistently "placed in lower-paying jobs."<sup>3</sup>

Dee Gunter joined a class action lawsuit along with 1.5 million current and former employees seeking justice against Walmart.<sup>4</sup> But justice never came. The nationwide class was ultimately not certified, so the class action failed. Class actions enable claims that are too costly for plaintiffs to litigate individually.<sup>5</sup> Ideally, all meritorious plaintiff classes that satisfy the Federal Rules of Civil Procedure (FRCP) criteria would be certified. But over time, a series of changes in civil procedure have made it more difficult for certain plaintiff classes, especially those composed of "disempowered groups," to obtain certification at all.<sup>6</sup>

Circuit courts are currently split on an issue that may make class certification even more difficult. The controversy at issue involves the application of the *Daubert* standard for expert evidence at the class certification stage. If applied at the certification stage, *Daubert* would require that the judge rely solely on expert testimony that would be admissible at trial in making the certification decision.<sup>7</sup> To apply *Daubert* at certification would make it more difficult for plaintiffs to obtain certification because evidence would have to meet a heightened admissibility standard. But without a rule stating that *Daubert* applies at certification, judges may use their discretion to determine whether a class should be certified based on the evidence presented to them.<sup>8</sup>

There are advantages and disadvantages to applying the *Daubert* standard at class certification. One purported benefit is decreased settlement pres-

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1. Liza Featherstone, *A Wal-Mart Worker's Horror Story*, DAILYBEAST (Apr. 27, 2010, 7:43 PM), <https://www.thedailybeast.com/a-wal-mart-workers-horror-story> [<https://perma.cc/4NFP-9J5V>].

2. *Id.*

3. *Id.*

4. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011).

5. See *infra* note 149 (discussing the monetary amount that the representative plaintiff in *Dukes* stood to gain); see also Ashley Panaggio, Note, *To Analyze or Not to Analyze: A Practical Solution to the Love-Hate Relationship Between Daubert and Certification in Class Action Proceedings*, 44 STETSON L. REV. 953, 977 (2015).

6. See A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 448–49, 479–80 (2013) (discussing how a series of decisions have limited certain out-groups' access to justice).

7. See FED. R. EVID. 702.

8. See Libby Jelinek, Comment, *The Applicability of the Federal Rules of Evidence at Class Certification*, 65 UCLA L. REV. 280, 323 (2018).

sure in cases involving nonqualified or nonmeritorious classes.<sup>9</sup> One drawback is potential plaintiffs' diminished access to the courts.<sup>10</sup> These competing considerations have led to a circuit split on whether and to what extent a full *Daubert* analysis should be conducted at certification. Resolving the split would make decisions more consistent and discourage plaintiffs from forum shopping. Potential resolutions, however, must take into consideration all types of class actions and all types of evidence beyond just expert testimony.

This Note explores the legal and policy concerns underlying the circuit split over *Daubert*'s applicability at the class certification stage. It proposes a standard that can resolve that split and govern the applicability of the Federal Rules of Evidence (FRE) more broadly. Part I discusses class certification procedure, the FRE, and the benefits and drawbacks of applying the *Daubert* standard at the certification stage. Part II examines the current split over *Daubert*'s applicability at certification and considers the issue in the broader context of all class action cases. Part III uses the lessons drawn from the *Daubert* debate to propose an optimal standard of admissibility for the class certification stage that would adequately balance the concerns of both putative plaintiffs and defendants. The proposed standard could further apply to other provisions of the FRE at class certification.

## I. THE INTERACTION BETWEEN THE FRE AND THE FRCP

Class action lawsuits in their modern form were introduced to federal civil procedure in 1966 when Rule 23 was added to the FRCP.<sup>11</sup> Class actions are a form of representative litigation, allowing one representative plaintiff to represent the interests of other plaintiffs who were affected by the actions of a given defendant.<sup>12</sup> The purpose of a class action is to save potential litigants, and the courts, substantial resources by consolidating plaintiffs with common claims into one group, represented by a class representative.<sup>13</sup> Class

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9. See L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1042 (2004) (arguing that judges certify unqualified classes in part because they rely on inadmissible evidence); see also Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1392 (2000) ("[P]laintiffs may be able to extract a substantial settlement even for weak claims. Plaintiffs' recovery thus reflects not the merit of their claims, but rather the defendant's fear of staking everything on a single trial."). But see Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1400–08 (2003) (arguing that class actions are not, in reality, coercive).

10. See Panaggio, *supra* note 5, at 977 (noting that "if a district court heavily scrutinizes expert testimony, it may be difficult for a putative class to meet its burden under Rule 23, in which case the action may not be brought").

11. Jelinek, *supra* note 8, at 282.

12. WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 1:1 (5th ed. 2011 & Supp. 2018).

13. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)); see also FED. R. CIV. P. 23.

actions also mitigate the massive economies of scale defendants enjoy from litigating numerous substantially similar cases, by allowing plaintiffs to benefit from the same investment as defendants.<sup>14</sup>

The FRCP govern the certification of class actions through Rule 23.<sup>15</sup> Although there is no specific timetable, the rule dictates that certification must occur early in the litigation.<sup>16</sup> Importantly, certification is intended to occur before merits discovery.<sup>17</sup> Rule 23(a) sets out four requirements that every class action must satisfy: (1) commonality, (2) typicality, (3) adequacy, and (4) numerosity.<sup>18</sup> If putative classes fail to satisfy these requirements, then the plaintiffs may only pursue individual lawsuits. In most cases, individual suits are impractical due to the high cost of litigation and the low pay-out per claim.<sup>19</sup>

To demonstrate commonality, putative class plaintiffs must show that there are “questions of law or fact common to the class.”<sup>20</sup> Before 2011, commonality was not difficult to demonstrate at the certification stage.<sup>21</sup> As one scholar notes, “[i]t was all but impossible to find cases [before 2011] in which courts denied certification because of a failure to satisfy Rule 23(a)(2).”<sup>22</sup>

*Wal-Mart Stores, Inc. v. Dukes* changed this approach to commonality.<sup>23</sup> In *Dukes*, a class of current and former female employees of Walmart stores alleged that local supervisors made discretionary, discriminatory promotion

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14. See Hay & Rosenberg, *supra* note 9, at 1379 & n.7, 1383–85 (“[A] defendant facing a large number of plaintiffs generally has an enormous, and unwarranted, upper hand over the plaintiffs. The defendant firm, but not the plaintiffs, can take advantage of economies of scale in case preparation, enabling it to invest far more cost-effectively in the litigation . . . [because] the cost of litigating a claim goes down if it is bundled with other similar claims.”).

15. FED. R. CIV. P. 23.

16. FED. R. CIV. P. 23(c)(1)(A).

17. Steig D. Olson, “Chipping Away”: *The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 946 (2009).

18. FED. R. CIV. P. 23(a).

19. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citing *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); see also FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment (“An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation.”); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469–70 (1978) (“[W]ithout the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination.”).

20. FED. R. CIV. P. 23(a)(2).

21. Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 730 (2015); Spencer, *supra* note 6, at 443–44.

22. Freer, *supra* note 21, at 730.

23. 564 U.S. 338 (2011).

and payment decisions in violation of Title VII.<sup>24</sup> The putative class argued that because Walmart afforded supervisors this discretion and was aware of the discriminatory effect it had on women, but failed to take steps to limit or eliminate the discretion, Walmart was responsible for the alleged disparate treatment.<sup>25</sup>

To demonstrate that they met the requirements of Rule 23, the putative class presented three types of evidence: statistical evidence, anecdotal evidence, and expert testimony from a sociologist who conducted a “‘social framework analysis’ of Wal-Mart’s ‘culture’ and personnel practices, and concluded that [Wal-Mart] was ‘vulnerable’ to gender discrimination.”<sup>26</sup> The Court found that even if the expert testimony had been able to demonstrate that plaintiffs were subject to discrimination, it was insufficient to demonstrate that the plaintiffs had been subject to *the same* discriminatory treatment in all stores and by all local supervisors.<sup>27</sup> It was not sufficient that all plaintiffs were subject to discrimination, or even that they all were subject to discrimination in violation of Title VII.<sup>28</sup> Instead, the Court explained that to satisfy commonality, the plaintiffs must demonstrate that the injury is so common among the class that it could be likened to “the assertion of discriminatory bias on the part of the same supervisor.”<sup>29</sup>

It is difficult to overstate the magnitude of the change that *Dukes* made on the commonality question. With *Dukes*, the question of commonality went from a foregone conclusion to an often prohibitive burden. As a result, obtaining certification against a major corporation became significantly more difficult.<sup>30</sup> Now, not only do the questions need to be the same—“were all employees discriminated against?”—but the answers need to be the same, too—“yes, because this specific manager would never promote women.”<sup>31</sup> Requiring sameness in these commonality questions and answers heightens the burden on putative class plaintiffs to produce evidence before discovery.

Typicality is demonstrated by showing that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”<sup>32</sup> Frequently, “[t]he commonality and typicality requirements of Rule 23(a) tend to merge.”<sup>33</sup> Adequacy is shown by demonstrating that “the representa-

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24. *Dukes*, 564 U.S. at 342.

25. *Id.* at 344–45.

26. *Id.* at 346 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 601 (9th Cir. 2010)).

27. *Id.* at 349–57.

28. *Id.* at 350.

29. *Id.*

30. See Spencer, *supra* note 6, at 447–48; see also Jelinek, *supra* note 8, at 292 (concluding that after the holdings in *Dukes*, “class certification has become much more difficult”).

31. See *Dukes*, 564 U.S. at 352.

32. FED. R. CIV. P. 23(a)(3).

33. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982); see also *Dukes*, 564 U.S. at 349 n.5 (quoting *Falcon*, 457 U.S. at 157 n.13).

time parties will fairly and adequately protect the interests of the class.”<sup>34</sup> The Supreme Court has noted that this requirement, too, tends to merge with commonality and typicality.<sup>35</sup> Adequacy, however, also “raises concerns about the competency of class counsel and conflicts of interest”<sup>36</sup> because class members who are absent from the litigation are still bound by the outcome of the case.<sup>37</sup> Concerns about adequacy can arise when members of the class feel that the class counsel, the class representatives, or both do not adequately represent their interests due to conflicts of interest.<sup>38</sup> To satisfy numerosity, putative class plaintiffs must show that “the class is so numerous that joinder of all members is impracticable.”<sup>39</sup> There is no threshold requirement given by Rule 23, so a court is free to make the determination of whether numerosity is satisfied.<sup>40</sup> Usually, this requirement is easily satisfied.

In addition to the four showings under Rule 23(a), the class must also fall into one of the categories described in Rule 23(b).<sup>41</sup> Rule 23(b)(1) can be used in two circumstances. The first, 23(b)(1)(A), arises when the defendant must treat all plaintiffs alike by law.<sup>42</sup> The second, 23(b)(1)(B), arises when those absent from the class may have their rights or interests affected by their absence—for example, in situations where there is a limited fund from which plaintiffs can be awarded damages.<sup>43</sup> Rule 23(b)(2) applies to classes for which final declaratory or injunctive relief would be appropriate because a common actor has treated all class members in the same way.<sup>44</sup> Finally, Rule 23(b)(3) pertains to classes that satisfy predominance such that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>45</sup> Rule 23(b)(3) is meant to encapsulate those situations in which a class action

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34. FED. R. CIV. P. 23(a)(4).

35. *Falcon*, 457 U.S. at 157 n.13; see also *Dukes*, 564 U.S. at 349 n.5 (quoting *Falcon*, 457 U.S. at 157 n.13).

36. *Falcon*, 457 U.S. at 157–58 n.13.

37. See BRIAN ANDERSON & ANDREW TRASK, CLASS ACTION PLAYBOOK § 1.04[3] (2018 ed.).

38. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (decertifying a class because of differences between the class representative and other class members in the manifestation of their injuries).

39. FED. R. CIV. P. 23(a)(1).

40. Jelinek, *supra* note 8, at 286 (citing *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013)).

41. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) (citing *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935 (7th Cir. 2010)).

42. Caroline H. Gentry, *A Primer on Class Certification Under Federal Rule 23*, ABA SEC. LITIG. 1, 6 (2014), [https://www.classactiondeclassified.com/wp-content/uploads/sites/26/2017/08/a\\_primer\\_class\\_certification\\_under\\_federal\\_rule.pdf](https://www.classactiondeclassified.com/wp-content/uploads/sites/26/2017/08/a_primer_class_certification_under_federal_rule.pdf) [<https://perma.cc/TJX4-2KHE>].

43. *Id.*

44. FED. R. CIV. P. 23(b)(2).

45. FED. R. CIV. P. 23(b)(3).

is a preferable method of resolving a dispute but that do not neatly fit into 23(b)(1) or 23(b)(2).<sup>46</sup>

For cases falling within 23(b)(3), the FRCP lay out four pertinent considerations in addition to the 23(a) considerations. These additional considerations are: (1) “the class members’ interests in individually controlling . . . separate actions”; (2) “the extent and nature of any litigation concerning the controversy already begun by or against class members”; (3) “the desirability or undesirability of concentrating the litigation of the claims in the particular forum”; and (4) “the likely difficulties in managing a class action.”<sup>47</sup>

A class “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”<sup>48</sup> To demonstrate this, the class must actually satisfy all of the aforementioned requirements of Rule 23(a) and 23(b).<sup>49</sup> Demonstrating compliance with Rule 23 is not a “mere pleading standard.”<sup>50</sup> In sum, a putative class must be prepared to prove compliance with Rule 23 *as fact* before the class can be certified.<sup>51</sup>

To demonstrate why a class should (or should not) be certified, both parties submit evidence. Increasingly, plaintiffs are using expert testimony to demonstrate their compliance with Rule 23.<sup>52</sup> For example, in the employment discrimination context, the plaintiffs in *Dukes* sought to enter expert statistical evidence “comparing the percentage of women promoted into management positions at Wal-Mart with the percentage of women in the available pool of hourly workers.”<sup>53</sup> Based on his findings, the expert deduced “that women were underrepresented in management in almost every one of Wal-Mart’s forty-one regions.”<sup>54</sup> The plaintiffs also sought to enter expert evidence from a sociologist who would “interpret and explain the facts that suggest that Wal-Mart has and promotes a strong corporate culture—a culture that may include gender stereotyping.”<sup>55</sup> In the mass tort context, the plaintiffs in *American Honda* sought to enter expert testimony related to how much “wobble,” or side-to-side movement, a motorcycle

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46. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

47. FED R. CIV. P. 23(b)(3).

48. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

49. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see also* Freer, *supra* note 21, at 736–37 (stating that *Dukes* required that the need for evidentiary proof applies to both FRCP 23(b)(3) and 23(a)).

50. *Dukes*, 564 U.S. at 350.

51. *Id.*

52. Hillel J. Bavli & John Kenneth Felter, *The Admissibility of Sampling Evidence to Prove Individual Damages in Class Actions*, 59 B.C. L. REV. 655, 683 (2018).

53. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 636 (9th Cir. 2010) (Ikuta, J., dissenting), *rev’d*, 564 U.S. 338 (2011).

54. *Id.*

55. *Id.* at 601 (majority opinion).



should reasonably have and whether Honda's Gold Wing GL1800 effectively "dampened" the wobble.<sup>56</sup>

Whether expert evidence can be considered at the certification stage depends on whether the FRE apply. Outside the class certification stage, Rule 702 of the FRE governs the admissibility of expert evidence through *Daubert*<sup>57</sup> hearings.<sup>58</sup> The *Daubert* standard states that an expert may testify if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>59</sup>

Although Rule 23 itself does not specify the standard of review that should be used to evaluate evidence at the certification stage,<sup>60</sup> there is a push to apply the *Daubert* standard.

Proponents of this view argue that certification, while a preliminary motion, is unique. Certification is not just another motion in class action litigation; it is often *the* motion.<sup>61</sup> Members of a putative class that is denied certification are unlikely to bring claims on an individual basis unless they are able to overcome the financial barrier.<sup>62</sup> Similarly, a defendant facing a certified class will likely opt to settle rather than go to trial and face "potentially ruinous liability."<sup>63</sup> Thus, certification decisions are extraordinarily important to both plaintiffs and defendants. As a result, the application of the FRE in this area is not just an evidentiary matter; it is a decision that can fundamentally change the nature of the litigation. If the FRE and *Daubert* apply, then the evidence will have to meet that heightened admissibility standard before it can be considered. Without the FRE and *Daubert*, a judge has discretion to consider the evidence in the context of its importance to the

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56. Am. Honda Motor Co. v. Allen, 600 F.3d 813, 814 (7th Cir. 2010).

57. While *Daubert* has technically been superseded by FRE 702, the *Daubert* case was the foundation for part of FRE 702 and is still used as the name for the standard today. See *United States v. Garcia Parra*, 402 F.3d 752, 758 (7th Cir. 2005).

58. FED. R. EVID. 702.

59. *Id.*

60. See FED. R. CIV. P. 23.

61. See Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 631 (2014) ("[T]he class certification process is the major, significant litigation event in class litigation, with serious, outcome-determinative effects for everyone."); see also Meredith M. Price, Comment, *The Proper Application of Daubert to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L. REV. 1349, 1351 (2012) (describing certification as the "apex" of class actions).

62. See *supra* note 19.

63. FED. R. CIV. P. 23 advisory committee's note to 1998 amendment.

certification decision regardless of whether it is in an admissible form for trial.<sup>64</sup>

There are advantages and disadvantages to either approach. Underlying the arguments in favor of the application of the FRE is the “belief that corporate defendants need judicial shielding from the coercive effect the certification decision can have on a defendant.”<sup>65</sup> When the class appears unqualified to satisfy Rule 23, or the underlying claims appear weak, this “coercive effect” seems particularly unfair.<sup>66</sup> Applying the *Daubert* standard could decrease the chances of nonmeritorious or unqualified (under Rule 23) class actions being certified.<sup>67</sup> This seems logical: if a judge were required to apply a heightened standard of scrutiny to evidence that would support certification, then fewer class actions would be certified. For example, some argue that application of the FRE at certification could detect the “junk science” of pricing structures in antitrust cases.<sup>68</sup> Further, potential defendants argue that certifying a class based on such inadmissible evidence would be fundamentally unfair because the evidence would be ultimately inadmissible at trial.<sup>69</sup>

Others argue that absent the application of *Daubert* at class certification, putative class plaintiffs could use inadmissible evidence to suggest the defendant is a bad actor in an attempt to prejudice the judge against the defendant.<sup>70</sup> Under this line of reasoning, a judge presented with damaging but inadmissible evidence is more likely to grant certification to an unqualified class out of spite for the “bad” defendants.<sup>71</sup> Similarly, putative plaintiffs could try to expand the record to overwhelm the judge and, in turn, encourage a judge to make a decision based on the volume of the record rather than

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64. See Jelinek, *supra* note 8, at 323 (“[J]udges should maintain the discretion to consider evidence . . .”).

65. Olson, *supra* note 17, at 939; see also Hay & Rosenberg, *supra* note 9, at 1392 (“[P]laintiffs may be able to extract a substantial settlement even for weak claims. Plaintiffs’ recovery thus reflects not the merit of their claims, but rather the defendant’s fear of staking everything on a single trial.”).

66. See Olson, *supra* note 17, at 939.

67. But cf. Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 364 (2010) (stating that “concerns in general about frivolous claims are unfounded and largely unverifiable” and later that “there is little substantial means by which to respond to the mantra that ‘most class actions have little merit’” (quoting D. Brian Hufford, *Deterring Fraud vs. Avoiding the “Strike Suit”: Reaching an Appropriate Balance*, 61 BROOK. L. REV. 593, 637 (1995))).

68. See John H. Johnson & Gregory K. Leonard, *In the Eye of the Beholder: Price Structure as Junk Science in Antitrust Class Certification Proceedings*, ANTITRUST, Summer 2008, at 108, 108–09.

69. See, e.g., Theodore E. Tsekerides et al., *Daubert: An Arrow in the Class Certification Opposition Quiver*, BLOOMBERG L. REP. (2009), <https://www.weil.com/~media/files/pdfs/daubert.pdf> [<https://perma.cc/HF3D-ZB6Q>].

70. See Mullenix, *supra* note 61, at 626–27.

71. *Id.*

demonstrated compliance with Rule 23.<sup>72</sup> Some argue that judges are extraordinarily busy, and when faced with a voluminous record from a putative class, will certify the class without investigating the record.<sup>73</sup>

Finally, proponents of applying the *Daubert* standard at certification argue that applying *Daubert* will conserve valuable judicial resources.<sup>74</sup> If *Daubert* applies at certification, courts will not have to decertify a class later.<sup>75</sup> This will also stave off settlement pressures by only applying those pressures when truly warranted.<sup>76</sup> Additionally, if the standard of evidence is heightened, plaintiffs' attorneys may more carefully consider the merits and qualifications of putative class actions before filing suits.<sup>77</sup>

There are, however, significant drawbacks to applying the *Daubert* standard at certification. Primarily, application of the FRE would make it harder for putative classes to obtain certification, whether those classes are qualified or not. This is problematic because class actions are one of the only means by which low-paying claims become worth pursuing.<sup>78</sup> Increasing the burden on these plaintiffs would affect those who need class action litigation the most, like victims of employment discrimination.<sup>79</sup>

Furthermore, class certification is a preliminary stage, designed to occur *before* discovery on the merits.<sup>80</sup> Applying the FRE would raise the burden and render this stage no longer preliminary.<sup>81</sup> Indeed, one of the benefits of declining to apply *Daubert* is preserving comparable case management flexibility at the certification stage.<sup>82</sup> Applying *Daubert* at the certification stage would be further complicated by the fact that the Supreme Court and some circuits have allowed investigations into the merits at the certification stage.<sup>83</sup> If the *Daubert* standard applies at the certification stage, certification will look more like a trial on the merits than simply a preliminary procedure.

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72. *Id.* at 624–25.

73. *Id.*

74. Chamblee, *supra* note 9, at 1042.

75. *Id.*

76. *See id.*

77. *See* Mullenix, *supra* note 61, at 634 (arguing that implementing the FRE at certification would “reign[] in inappropriate and burdensome litigation conduct all around” and would “induce attorneys to carefully and thoughtfully assemble their class certification materials”).

78. *See supra* note 19.

79. *See infra* note 149.

80. Olson, *supra* note 17, at 936, 946.

81. *See* Jelinek, *supra* note 8, at 317 (“[Class certification] is still chiefly a preliminary mechanism.”).

82. *See* Meredith M. Price, *supra* note 61, at 1371 (“The primary benefit [of not applying *Daubert*] is in limiting discovery and promoting effective case management by avoiding the formality and procedural requirements of a *Daubert* proceeding.”).

83. *See* Kaufman & Wunderlich, *supra* note 67, at 329 (“[T]he emerging view among the circuits is that district courts must consider evidence which goes to the requirements of Rule 23 even if it affects the underlying merits of the case . . . .”); *see also* Freer, *supra* note 21, at 723 (noting that there is a trend in class actions toward “front-loading” class action litigation).

Not only is this shift problematic from a jurisprudential sense,<sup>84</sup> but it would also disproportionately affect the decisionmaking of plaintiffs' attorneys, who would have to prove all of the Rule 23(a) requirements under the heightened admissibility standard.<sup>85</sup> Plaintiffs' attorneys will need to weigh the costs of performing a full merits discovery before the discovery stage. And plaintiffs will have to gather a variety of evidence during this period to support their claims. This includes statistical evidence,<sup>86</sup> economic evidence,<sup>87</sup> and counterfactual evidence more generally.<sup>88</sup> Not only will an expert have to conduct these studies before certification but the judge will also have to evaluate them. Consequently, a number of potentially meritorious and qualified, but difficult to prove, cases will likely fail to obtain certification.<sup>89</sup> Although there needs to be some form of accountability at the certification stage, it should not be of such a high standard that even qualified classes of plaintiffs would not be certified.

Applying one consistent standard of evidence across all class certifications is critical to uphold fundamental notions of justice and to deter forum shopping. Allowing different standards of evidence to apply to otherwise similar classes undermines the uniformity of federal law. Further, having different standards of evidence can lead to forum shopping.<sup>90</sup> Forum shopping occurs when a party takes advantage of inconsistent application of the law by choosing to file in a favorable jurisdiction.<sup>91</sup> One Supreme Court justice has described this practice as "evil"<sup>92</sup> and an "injustice,"<sup>93</sup> presumably because courts are expected to apply equal justice under the law without regard to jurisdiction.

## II. DIFFERENT STANDARDS FOR DIFFERENT CLASSES

The Supreme Court has not formally weighed in on whether evidence at class certification must be admissible. Additionally, the Court has not directed circuit courts that have weighed in on this question to evaluate how their solutions would more generally affect class actions. Two Supreme

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84. What is the point of having a discovery phase if all of the litigation occurs before it?

85. See Freer, *supra* note 21, at 723 (noting that front-loading in class certification disproportionately affects plaintiffs' attorneys).

86. See Bavli & Felner, *supra* note 52, at 655.

87. Johnson & Leonard, *supra* note 68.

88. See Jonah B. Gelbach, *The Triangle of Law and the Role of Evidence in Class Action Litigation*, 165 U. PA. L. REV. 1807, 1818 (2017) (describing counterfactual evidence used in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)).

89. See Panaggio, *supra* note 5, at 977 ("[I]f a district court heavily scrutinizes expert testimony, it may be difficult for a putative class to meet its burden under Rule 23 . . .").

90. See Sanford Caust-Ellenbogen, Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1082 (1984).

91. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 522 (1953) (Jackson, J., dissenting).

92. *Id.* at 521; Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 336 (2006).

93. *Wells*, 345 U.S. at 522 (Jackson, J., dissenting).

Court decisions, however, set the stage for the present circuit split. Although the class in *Dukes* was decertified on other grounds, Justice Scalia noted in the majority opinion, “[t]he District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . .”<sup>94</sup> But the Court then stated that the admissibility of the expert testimony did not matter because, even if the expert in question had met the *Daubert* standard, the testimony would not have helped the class prove the necessary elements of Rule 23.<sup>95</sup>

Later, in *Comcast Corp. v. Behrend*, the Court seemed poised to resolve the debate. There, plaintiffs were Comcast cable subscribers who alleged that Comcast pursued a clustering scheme to concentrate operations in a specific region in violation of federal antitrust laws.<sup>96</sup> To demonstrate their damages, the plaintiffs’ expert conducted a regression analysis.<sup>97</sup> Comcast asked the Court to review the following question: “[W]hether a district court may certify a class action without resolving ‘merits arguments’ that bear on [Federal Rule of Civil Procedure] 23’s prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).”<sup>98</sup> Yet upon granting cert, the Supreme Court rephrased the question to “[w]hether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.”<sup>99</sup> Ultimately, because Comcast failed to preserve the issue of admissibility, the Court did not rule on the admissibility of expert testimony.<sup>100</sup> Instead, the Court stated that the damages model failed to correspond with the remaining theory of anticompetitive behavior because it also reflected three previously rejected theories.<sup>101</sup> As a result, the question remains open and continues to spark disagreement between the circuits.<sup>102</sup>

Even before *Dukes* and *Comcast*, circuit courts struggled to agree whether the FRE apply at the certification stage.<sup>103</sup> Justice Scalia’s dicta in *Dukes*

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94. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011) (citation omitted).

95. *Id.*

96. Comcast Corp. v. Behrend, 569 U.S. 27, 29–30 (2013) (explaining that Comcast became the predominate cable provider in the plaintiffs’ region by increasing their percentage of subscribers from 23.95 percent to 69.5 percent).

97. *Id.* at 36–37.

98. *Id.* at 39 (Ginsburg & Breyer, JJ., dissenting) (alterations in original) (quoting Petition for Writ of Certiorari at i, *Comcast*, 569 U.S. 27 (No. 11–864), 2012 WL 105558).

99. *Id.* (quoting Comcast Corp. v. Behrend, 567 U.S. 933 (2012)).

100. *Id.* at 39–40.

101. *Id.* at 38 (majority opinion).

102. Nick A. Williford, Comment, *After Comcast Corp. v. Behrend: Must a District Court Apply the Daubert Test for the Admissibility of Expert Evidence at the Class Certification Stage?*, 37 AM. J. TRIAL ADVOC. 393, 420 (2013).

103. Compare *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 191 (N.D. Cal. 2004) (“[C]ourts should not even apply the full *Daubert* ‘gatekeeper’ standard at this stage.” (quoting *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993))), with *Am. Honda Motor Co. v. Allen*, 600 F.3d

did not resolve the split, and as a result, different circuits apply different levels of analysis at the certification stage.<sup>104</sup>

The Third, Fifth, Seventh, and Eleventh Circuits have held or implied that the *Daubert* standard applies at the class certification stage. In *American Honda*, a manufacturing class action, the Seventh Circuit held that “a district court must conclusively rule on any challenge to the expert’s qualifications or submissions prior to ruling on a class certification motion” when the “expert’s report or testimony is critical to class certification.”<sup>105</sup> Then, in *Messner v. Northshore University HealthSystem*, an antitrust class action, the Seventh Circuit clarified its definition of “critical,” noting that “critical” is to be interpreted broadly and, when in doubt, the district court must conduct a full *Daubert* hearing.<sup>106</sup>

In explaining when *Daubert* should apply at class certification, the Seventh Circuit encouraged caution when it is unclear how critical an expert’s testimony is to the certification decision. Weighing the interests of putative plaintiffs and defendants regarding the inclusion or exclusion of non-critical expert testimony, the Court wrote, “[a]n erroneous *Daubert* ruling excluding non-critical expert testimony would result, at worst, in the exclusion of expert testimony that did not matter.”<sup>107</sup> When such testimony is critical to the certification decision, however, not applying *Daubert* would lead to “unreliable testimony [that] remains in the record,” which “could easily lead to reversal on appeal.”<sup>108</sup> In justifying its decision, the Seventh Circuit in *Messner* also cited the dicta in *Dukes* that expressed doubt as to the Ninth Circuit’s nonapplication of *Daubert* at the certification stage.<sup>109</sup>

The Eleventh Circuit, while persuaded by the Seventh Circuit’s analysis, has not yet determined when or how thoroughly the *Daubert* inquiry must apply. In *Sher v. Raytheon Co.*, an environmental class action, the Eleventh Circuit remarked that it found *American Honda*’s holding persuasive.<sup>110</sup> But rather than holding that a full *Daubert* inquiry is required, it criticized the district court for failing to undertake a “*Daubert*-like critique of the proffered experts’s [sic] qualifications.”<sup>111</sup> Thus, it is unclear what level of inquiry the Eleventh Circuit expects district courts to apply. It is clear, however, that

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813, 815–16 (7th Cir. 2010) (holding that the district court must rule on challenges to expert testimony at the certification stage).

104. *Compare* *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (“[A]dmissibility must not be dispositive.”), *with* *Toney v. Quality Res., Inc.*, 323 F.R.D. 567, 577–80 (N.D. Ill. 2018) (conducting a full *Daubert* analysis on the plaintiff class’s expert testimony at the certification stage).

105. *Am. Honda*, 600 F.3d at 815–16.

106. 669 F.3d 802, 812 (7th Cir. 2012).

107. *Messner*, 669 F.3d at 812.

108. *Id.*

109. *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011)).

110. *Sher v. Raytheon Co.*, 419 F. App’x 887, 890 (11th Cir. 2011).

111. *Id.* at 890–91.

expert testimony must be subject to some level of scrutiny before the class is certified.

The Third Circuit adopted a similar approach to the Seventh Circuit when evidence is deemed critical to the certification decision. In *In re Blood Reagents Antitrust Litigation*, an antitrust class action decided after both *Dukes* and *Comcast*, the Third Circuit held that “a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*.”<sup>112</sup> This replaced the Third Circuit’s previous formulation, which examined whether evidence “could evolve” to an admissible form.<sup>113</sup> The Third Circuit cited language in both *Comcast* and *Dukes* to support its shift.<sup>114</sup> Specifically, the Third Circuit pointed to the Supreme Court’s statement in *Comcast* that courts need to rigorously analyze expert evidence on damages at the certification stage.<sup>115</sup>

Although it has not directly considered the question of *Daubert*’s applicability, the Fifth Circuit, in relevant dicta, has taken the most direct stance that evidence at certification must be admissible evidence. In *Unger v. Amedisys Inc.*, the Fifth Circuit commented that certification must be “based on adequate *admissible* evidence.”<sup>116</sup> Unlike the circuits discussed above, the Fifth Circuit did not limit this statement to evidence deemed “critical” at certification.<sup>117</sup>

In summary, the Third, Seventh, and Eleventh Circuits have all adopted some level of *Daubert* analysis at class certification, and the Fifth Circuit has signaled agreement. Some circuits, like the Seventh Circuit, have limited the application of the *Daubert* standard to situations where the challenged testimony is “critical” to the certification decision. Together, these circuits represent the side of the split that applies *Daubert*, in some form, at class certification.

The Eighth and Ninth Circuits take a different view. These circuits have held that district courts are not limited to considering only admissible evidence in evaluating the Rule 23 requirements. Most recently, in *Sali v. Corona Medical Center*, an employment class action, the Ninth Circuit held that while admissibility should be considered at certification, it “must not be dispositive.”<sup>118</sup> In *Sali*, the Ninth Circuit explained that in many situations, “[b]y relying on formalistic evidentiary objections” under *Daubert*, the district court would be required to exclude evidence that could be admissible in

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112. 783 F.3d 183, 187 (3d Cir. 2015).

113. *In re Blood Reagents Antitrust Litig.*, 783 F.3d at 186–87.

114. *See id.* at 186–88.

115. *Id.* at 187 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013)).

116. 401 F.3d 316, 319 (5th Cir. 2005) (emphasis added).

117. *See Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1004–05 (9th Cir. 2018).

118. *Id.* at 634.

another form at trial.<sup>119</sup> The court further explained that admissibility can, and should, go to the weight of evidence at the certification stage.<sup>120</sup> In making this determination, the Ninth Circuit did not discuss the Supreme Court's inclinations toward applying *Daubert* at certification expressed in the *Dukes* and *Comcast* dicta.

Similarly, in *In re Zurn Pex*, a manufacturing class action, the Eighth Circuit approved the district court's "'tailored' *Daubert* analysis," which examined "the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered."<sup>121</sup> In explaining why it found this approach prudent, the Eighth Circuit also pointed to the possibility that evidence could evolve into an admissible form during the discovery process.<sup>122</sup> It noted that the purpose of *Daubert* is to keep inadmissible evidence away from juries, and thus "[t]hat interest is not implicated at the class certification stage where the judge is the decision maker."<sup>123</sup> Finally, the Eighth Circuit emphasized the preliminary and limited nature of the class certification motion.<sup>124</sup>

In each of these cases, the court ruling was limited to the case at issue and did not consider the implications of applying the FRE to other types of cases. For example, when the Third Circuit changed its standard in *In re Blood Reagents*, the court only stated that plaintiffs may not rely on challenged expert testimony unless it passes the *Daubert* standard and that the plaintiffs in the antitrust case before them did not meet that standard.<sup>125</sup> The Third Circuit's oversight of the broader implications of their chosen standard is not unique. Across the board, courts have not fully explored what the application, or nonapplication, of *Daubert* would mean in other types of cases.<sup>126</sup>

For certain types of class actions, it is inherently more difficult to gather evidence due to the nature of the questions presented. For example, it is easier to demonstrate a common harm in an antitrust class action than in an employment class action, due to the relationship between the potential plaintiffs and the potential defendant.<sup>127</sup> One company can affect many people in the same way by setting anticompetitive prices, which plaintiffs may demonstrate by showing the offered prices.<sup>128</sup> Yet proving that the same company's

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119. *Id.* at 633.

120. *Id.* at 634.

121. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011).

122. *Id.*

123. *Id.* at 613.

124. *Id.*

125. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187–88 (3d Cir. 2015).

126. *See, e.g., id.*; *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010).

127. *See infra* notes 129–130 and accompanying text.

128. *See, e.g., In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1168 (1979) (holding that an allegation of purchasing the product at the allegedly fixed price was enough to establish an injury to one's "property" under the Clayton Act).



employment practices have a sufficiently common discriminatory effect on employees requires policies that are outright discriminatory.<sup>129</sup> In other words, a smoking gun that sufficiently demonstrates merits sufficient for qualification under Rule 23 is more difficult to find in employment discrimination claims.<sup>130</sup>

Thus, at the class certification stage, a heightened admissibility standard disproportionately affects certain types of class actions, such as employment discrimination class actions.<sup>131</sup> This disproportionate effect will require greater expenditure of resources before the discovery stage in certain cases. Rule 23's requirements in employment discrimination cases will be demonstrated in part through both individual accounts and expert testimony.<sup>132</sup> The resources expended by the plaintiff will be substantially greater than in an antitrust case in which damages can be demonstrated by an expert through computer modeling.<sup>133</sup>

Given these higher costs, it is less surprising that the Ninth Circuit refused to adopt *Daubert* for class certification in an employment discrimination case.<sup>134</sup> But the Supreme Court's position remains largely unsatisfying. Justice Scalia's famous dicta comes in an employment class action suit.<sup>135</sup> And following *Dukes*, the Court dodged the question of whether *Daubert* applies to class certification in an antitrust case.<sup>136</sup>

This back-and-forth seems to indicate that underlying the *Daubert* struggle is a continuation of the argument over what types of class actions the courts are willing to recognize as worthy of the class action vehicle. In this context, it is especially telling that the *Dukes* dicta, which is the Supreme Court's most direct advancement of the position that *Daubert* should apply at certification, appeared in an employment discrimination case. This would be a continuation of what Professor Spencer has called "restrictive ethos," the Court's practice of manipulating procedural rules to "thwart disfavored claims asserted by members of disempowered groups against members of the

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129. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 353 (2011).

130. See *id.*; see also Spencer, *supra* note 6, at 480 ("Why are discrimination claims disfavored? At bottom, it appears that jurists who disfavor these claims do so because they do not believe in them. . . . Explicit evidence of racial animus is demanded before this presumption can be overcome.").

131. See Spencer, *supra* note 6, at 448–49, 480, 484–85 (discussing how "societal outgroups" challenging large businesses on the basis of discrimination must overcome a presumption against the validity of their claims and a Court willing to change procedure to make their certification more difficult).

132. See *Dukes*, 564 U.S. at 346 (noting that the plaintiffs used expert statistical evidence, anecdotal evidence, and expert testimony of a sociologist at certification).

133. Compare *id.*, with *Comcast Corp. v. Behrend*, 569 U.S. 27, 45–47 (2013) (Ginsburg & Breyer, JJ., dissenting) (explaining the four theories of anticompetitive behavior the expert modeled).

134. *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018).

135. *Dukes*, 564 U.S. at 354.

136. *Comcast*, 569 U.S. at 32–33 n.4.

dominant class.”<sup>137</sup> Professor A. Benjamin Spencer details an ongoing pattern of hostility toward discrimination claims, which have already faced numerous new obstacles.<sup>138</sup> The *Dukes* dicta continued this trend, and the inconsistency that followed reflects the courts struggling with where to draw the line on which class actions should be presupposed as qualified.

In addition to disregarding the effect of applying *Daubert* at certification on certain class actions, courts have failed to consider the application of other provisions of the FRE to the certification stage.<sup>139</sup> Other rules of evidence, such as the hearsay rules, could also apply at certification. The application of hearsay would also negatively affect employment class actions, as a considerable amount of evidence is anecdotal.<sup>140</sup> Ideally, courts would adopt a standard that treats *Daubert* and other FRE provisions identically. This would address the concerns of symmetry and provide clear direction for courts as well as potential litigants.

But just as courts have failed to consider both the effect of *Daubert* on all types of class actions *and* the application of other rules of evidence at certification, legal scholars have too. Current proposals to resolve this issue share the same narrow approach as the courts; they do not sufficiently consider the effect of the *Daubert* standard on different types of class actions.<sup>141</sup> For example, Professor Linda Mullenix’s proposals to move courts away from the view that “no rules of evidence apply” do not consider the effect of these changes on specific types of class actions.<sup>142</sup> Commentators who have considered the effect have typically proposed different standards depending on the type of class action.<sup>143</sup> Additionally, scholars have failed to consider the role of other provisions of the FRE that could go to admissibility at class certification. For example, one proposal that the Supreme Court should adopt a full *Daubert* inquiry at class certification does not consider the application of other provisions of the FRE at certification.<sup>144</sup> The ambiguous effect of the FRE on certification is problematic for future litigation. It leaves open the possibility that a debate like the one surrounding applicability of the *Daubert* standard will appear in other contexts, causing uncertainty for litigants and circuit courts and thus mitigating the clarifying benefits of such a proposal.

The failure of the courts and legal scholars to develop a standard that governs all types of class action cases, as well as the FRE more broadly, has

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137. Spencer, *supra* note 6, at 449.

138. *Id.* at 475–76.

139. See Jelinek, *supra* note 8, at 284 (“[C]ourts’ current analysis of whether the FRE apply [to certification] is underdeveloped.”).

140. See *Dukes*, 564 U.S. at 346 (noting that the plaintiffs used statistical evidence, anecdotal evidence, and expert testimony of a sociologist at certification).

141. See, e.g., Mullenix, *supra* note 61.

142. See *id.* at 645–50.

143. See, e.g., Panaggio, *supra* note 5, at 988–89 (arguing that courts should adopt “a sliding *Daubert* scale at certification”).

144. See Price, *supra* note 61.

led to different standards across the country, forum shopping, and differing access to justice. In order to remedy this situation, a new standard that considers all rules of evidence is needed at the certification stage.

### III. APPLYING A MULTIFACTOR TEST TO THE CERTIFICATION DECISION

To remedy these problems, the Rules Advisory Committee should amend the Federal Rules of Civil Procedure to state that a modified form of the entire Federal Rules of Evidence apply at class certification. At the certification stage, courts should consider the obstacles to admissibility of the evidence, the centrality of the evidence to the certification decision, and the likelihood of admissibility after discovery. No one factor should be dispositive. The first two factors—obstacles to admissibility and centrality to certification—should be viewed in conjunction with each other. The more central the evidence is to the certification decision, the more stringently the court should consider its admissibility limitations. The relationship between the centrality of the evidence and the significance of its limitations should then be viewed through the lens of the third factor—whether the evidence could evolve to an admissible form. This third factor should be used as a check on the court's determination regarding the first two factors.

To illustrate this point, consider expert testimony that is extremely central to the certification decision and likely admissible. This evidence should certainly be admitted at this stage, as there is nothing problematic about it. In this situation, the court should not ask whether the evidence could evolve, because it is already in a certification-admissible form. Alternatively, consider expert testimony that is extremely central to the certification decision but likely inadmissible under a full *Daubert* analysis. In this situation, the court should ask whether the evidence could evolve to an admissible form. If the court determines that the evidence can evolve, then it should be admitted.<sup>145</sup> Admitting evidence of this nature makes sense; a class should not be punished for having the required evidence, even if it is not in the admissible form. Finally, consider evidence central to the certification decision that would be inadmissible at trial and is unlikely to evolve to an admissible form during discovery. A court should not admit this evidence because it would never be admissible.<sup>146</sup>

Evidence not central to the certification decision will not require as much scrutiny as evidence that is more central.<sup>147</sup> If a court is unsure about

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145. This would be like the *Sali* case, discussed in text accompanying notes 118–120.

146. This test may not apply equally to classes seeking injunctive relief, as they would not feel settlement pressure in the same way. This is because a defendant facing injunctive relief would not face the same “potentially ruinous liability” that a defendant facing monetary relief would. See FED. R. CIV. P. 23 advisory committee’s notes to 1998 amendment.

147. The ability of courts to disregard evidence that is not central to class certification is reflective of the Seventh Circuit’s approach. See *supra* notes 107–109 and accompanying text. However, the proposed approach has the added benefit of ensuring that centrality and admis-

whether the evidence will evolve to an admissible form but certain that the evidence is not central to the overall liability question, then the court should be more willing to allow it. This is because the risk of harm to the defendant is low. Of course, the court should still consider whether the evidence could evolve to an admissible form and allow a change of opinion based on the possibility of evolution.

At first glance, this test may appear complicated, time-consuming, or unadministrable. Although this may be true to some extent, it is not any more time-consuming than when a judge, who may not have expertise in regression analysis, attempts to decide whether a certain antitrust model should be admitted. Both *Daubert* and this set of questions involve a significant output of time and attention by the judge. And the aforementioned test allows for the necessary flexibility at the certification stage. A standard that is too strict at certification will mean otherwise meritorious classes are denied certification. To be sure, not all classes should be certified, as defendants do have real concerns at the certification stage. Yet the standard adopted should not be so strict as to block even meritorious classes from obtaining certification.

Some might argue that employment discrimination plaintiffs already bring individualized suits and, therefore, do not need the option of bringing a class action.<sup>148</sup> Although some employees do indeed bring discrimination claims against their employers, these claims are not the same as those that require the class action device. For example, the *Dukes* case was brought as a class action because the damages would not be significant enough to warrant individual lawsuits, as the plaintiffs were primarily low-wage employees.<sup>149</sup> Thus, if class actions become even more difficult to certify, low-wage-earning plaintiffs will suffer disproportionately because they have no other way to litigate their claims outside of a class action.

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sibility are not the only inquiries by encouraging courts to consider the ability of the evidence to evolve after full discovery.

148. For example, one might point to multimillion-dollar employment discrimination suits as evidence that the class action mechanism is not necessary for an employment discrimination to be brought. Michael S. Schmidt & Maria Newman, *Jury Awards \$11.6 Million to Former Knicks Executive*, N.Y. TIMES (Oct. 2, 2007), <https://www.nytimes.com/2007/10/02/sports/basketball/03garden-cnd.html> (on file with the *Michigan Law Review*); see also Kristina Monllos, *Former Kargo Sales Exec Awarded \$40 Million in Arbitration over Gender Wage Discrimination, Wrongful Termination*, ADWEEK (June 8, 2017), <https://www.adweek.com/agencies/former-kargo-sales-exec-awarded-40-million-in-arbitration-over-sexual-discrimination-wrongful-termination> (on file with the *Michigan Law Review*).

149. For example, Betty Dukes sought a promotion from cashier to customer service manager. At the time of this writing, a cashier at Walmart is paid \$10.17 per hour, while a customer service manager is paid \$12.23 per hour. Per year (with a forty-hour week, forty-eight weeks out of the year) the total difference in salary is \$3,955.20. Obviously, this would not be worth litigating individually, because litigation would easily exceed \$3,955.20. *Walmart Salaries in the United States*, INDEED, <https://www.indeed.com/cmp/Walmart/salaries> [https://perma.cc/ZS6G-BUXE].

This standard would also be applicable beyond *Daubert* to other evidentiary burdens, like hearsay, that could apply at the certification stage. This proposal dovetails well with the knowledge that litigants present multiple types of evidence to demonstrate their claims.<sup>150</sup> And these different types of evidence can present different admissibility concerns. This standard could preempt further circuit splits about whether other portions of the FRE should apply at certification.

This solution is preferable to a more stringent standard and adequately addresses the concerns of potential defendants who do not want to be pressured into settling after a nonmeritorious class certification.<sup>151</sup> In addition, this standard still allows the court to deny certification if a class cannot sufficiently meet its burden. Furthermore, it still allows the defendant to bring a *Daubert*-like challenge. That challenge could demonstrate that the plaintiff's evidence cannot evolve to an admissible form even following discovery, or that the evidence is so flawed and so critical to the certification decision that the judge should not rely on it.

Defendants' concerns are balanced against the need for potential class plaintiffs to have a fair opportunity to litigate their claims. Class certification provides one of the only avenues for some potential plaintiffs to litigate their claims.<sup>152</sup> If their class is not certified, plaintiffs may be less likely to bring their claims individually,<sup>153</sup> thus limiting their access to justice.<sup>154</sup> As some scholars have argued, this would disproportionately limit access to justice for certain claimants, like employment discrimination plaintiffs.<sup>155</sup> Under the proposed standard, the plaintiffs still must demonstrate that they will have sufficiently strong evidence to warrant certification. But the plaintiffs will not be required to fully obtain that evidence before formal discovery.

As a result, this standard also preserves the integrity of the discovery and trial processes. Assessing the admissibility of evidence and the merits of the case before formal discovery would functionally transform the certification stage into a trial.<sup>156</sup> This is problematic because it could undermine the discovery process<sup>157</sup> and, as mentioned above, would negatively affect plain-

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150. Jelinek, *supra* note 8, at 284.

151. Chamblee, *supra* note 9, at 1042, 1085.

152. See *supra* note 19.

153. See *supra* note 19.

154. See Spencer, *supra* note 6, at 448–49 (discussing the Court's trend toward making it more difficult for plaintiffs to bring claims, thus restricting their "access to justice").

155. See *id.* at 475–76 (discussing how the current trend of restricting access to justice is used against "societal outgroups asserting disfavored claims against the dominant class").

156. See Freer, *supra* note 21, at 723 ("The Court has made clear that certification does not raise a question of pleading, but must be based upon 'conclusive proof.' The fact that the evidence overlaps with the substantive merits of the dispute is irrelevant."); see also Jelinek, *supra* note 8, at 317 ("Class certification serves the narrow purpose of determining whether the requirements of FRCP 23(a) and (b) are satisfied.").

157. See Freer, *supra* note 21, at 723 (noting that the Court has evinced a willingness to look at evidence, despite the fact that it overlaps with the merits of the case); Jelinek, *supra* note

tiffs.<sup>158</sup> The proposed standard avoids this problem by preserving the preliminary nature of the certification phase. While litigants must still present evidence—and that evidence still needs to be in a form that allows the judge to evaluate its future admissibility and centrality to the decision—the evidence will not be formulaically excluded. This standard provides flexibility in the form and quantity in which plaintiffs present their evidence. At the same time, the standard allows the court discretion to assess the evidence’s centrality and likelihood of admissibility at this stage.

Some scholars have advocated for allowing judges to have total discretion.<sup>159</sup> For example, after conducting a broad assessment of the language and meaning of Rule 1101(d) of the Federal Rules of Evidence,<sup>160</sup> which provides a list of proceedings in which the FRE do not apply, one commentator concluded that the FRE should not apply to class certification.<sup>161</sup> They argue that any normative benefit would be outweighed by the hindrance on judges’ use of discretion<sup>162</sup> and the “flood of evidentiary objections” that would overwhelm the courts.<sup>163</sup> As a result, “[g]iven the relatively low benefit gained from strictly applying the FRE, and in order to stay true to its discretionary nature, judges should maintain the discretion to consider evidence even if it might otherwise be inadmissible at trial.”<sup>164</sup> While offering persuasive arguments against applying the FRE at class certification, this conclusion does not recognize the importance of class certification, and the resulting settlement pressure, for defendants.<sup>165</sup> Indeed, judicial discretion certainly has its place in the certification decision, but there must be some guidance to ensure uniformity across jurisdictions. Otherwise, the same lack-of-uniformity problems that are present now will persist.<sup>166</sup> Furthermore, even if unbridled judicial discretion at certification is normatively correct, it is a system that is unlikely to survive. Over time, class certification has

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8, at 317–18 (noting that a key difference between trial and class certification is the nonbinding nature of any merits determinations).

158. See Freer, *supra* note 21, at 723 (noting that front-loading in class certification disproportionately negatively affects plaintiffs’ attorneys).

159. See, e.g., Jelinek, *supra* note 8, at 323.

160. Jelinek’s analysis of the FRE examines congressional intent, the application of the FRE to similar proceedings, and the preliminary nature of the class certification proceeding. *Id.* at 303–19.

161. *Id.*

162. *Id.* at 321.

163. *Id.* at 322.

164. *Id.* at 323.

165. FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment; Chamblee, *supra* note 9, at 1042. As noted above, class actions are notoriously frightening for defendants, who will settle even nonmeritorious class actions following an approved motion for certification. Hay & Rosenberg, *supra* note 9, at 1392.

166. See Caust-Ellenbogen, *supra* note 90, at 1082–83 (discussing how different standards in different circuits can lead to forum shopping and other inefficiencies).

become more difficult to obtain.<sup>167</sup> Given this landscape, judges must strike a careful balance that respects both the needs of defendants *and* the needs of plaintiffs. Otherwise, the pendulum might swing too far in the other direction, with standards becoming so stringent that it is all but impossible for a class action to be certified.

Other commentators have stated that we need to apply different levels of analysis depending on the case in front of the court. For example, one suggests applying different levels of scrutiny to securities class actions, antitrust class actions, and mass tort class actions, respectively.<sup>168</sup> The level of scrutiny corresponds with how significantly the certification decision overlaps with the merits of the claim.<sup>169</sup> This would allow courts to continue to exercise discretion while providing guidance on what level of analysis should apply.<sup>170</sup> But this proposal raises a critical problem: cases do not always fall cleanly into one type of law, even in class actions. Further, even within anti-trust class actions, different actions by defendants affect how duplicative the plaintiffs' claims truly are, and, thus, how much the merits overlap with the certification decision.<sup>171</sup> Therefore, a sliding scale still requires courts to use significant, unguided discretion to determine *when* a full *Daubert* analysis should apply.

Beyond balancing the needs of both plaintiffs and defendants, the proposed standard is more compatible with certification than the FRE. The FRE are meant to protect juries, not judges.<sup>172</sup> Applying a strict standard of evidence to certification does not serve this interest, as it is the judge alone who makes the certification decision. Further, although some commentators argue that judges themselves need to be protected from the inadmissible evidence,<sup>173</sup> applying *Daubert* would not fix this, as the judge would still need to examine the evidence in order to make the *Daubert* ruling.

Finally, there are other checks on class certification that adequately serve the interests and concerns of those who would like to see full *Daubert* apply. For example, the persuasiveness of evidence is a check on admissibility.<sup>174</sup> This allows judges to decide, even at the certification stage, what evidence they find most persuasive, even if both plaintiff and defense experts present

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167. See Mullenix, *supra* note 61, at 622 (summarizing the variety of changes that have made it more difficult to certify a class).

168. Panaggio, *supra* note 5, at 982–88.

169. *Id.* at 984, 986, 991.

170. *Id.* at 991.

171. *Id.* at 986.

172. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011).

173. See Mullenix, *supra* note 61, at 626 (arguing that, absent the application of the FRE at certification proceedings, judges can be persuaded to certify a class by inadmissible evidence demonstrating that the defendant is a bad actor).

174. Anthony F. Fata, *Doomsday Delayed: How the Court's Party-Neutral Clarification of Class Certification Standards in Wal-Mart v. Dukes Actually Helps Plaintiffs*, 62 DEPAUL L. REV. 675, 682–83 (2013).

admissible evidence.<sup>175</sup> Moreover, other practices have evolved since the first class action, and one could go so far as to say that there is a presumption *against* class certification now.<sup>176</sup> These practices and orientations, coupled with the proposed test above, would adequately protect the interests of those concerned about frivolous class actions.

#### CONCLUSION

In an ideal world, all meritorious and qualified class actions would be certified and all nonmeritorious class actions would be quickly and easily denied certification. Unfortunately, we do not live in an ideal world. Instead, we live in a world in which both settlement pressures and the need for class actions are very real. Balancing those interests is a difficult task, as both are significant and can have drastic implications.

The judicial system's effort to balance these interests has led to a circuit split and made it difficult for certain putative classes to obtain certification. In many circumstances, a class action is the only mechanism by which these plaintiffs can obtain relief. While it is problematic to limit these plaintiffs' access to justice, it is equally problematic to certify an unqualified class due to the pressure it puts on defendants.

This Note responds to these competing interests by proposing a standard that ensures that evidence is fairly evaluated while preserving an avenue to relief for plaintiffs. It protects defendants by insulating them from non-meritorious settlement pressure, while still protecting plaintiffs by giving them the necessary flexibility to bring their otherwise nonlitigable claims. It is plaintiffs like Dee Gunter, who would be unable to pursue their claims without the mechanism of class actions, who are the primary beneficiaries of this standard. While recent decisions have diminished access to justice for claims like Dee Gunter's, the evaluation of evidence at certification need not be a continuation of that trend. This Note's proposed standard may not create an ideal world for class actions, but it does move it closer to one.

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175. See *id.* at 682.

176. See Mullenix, *supra* note 61, at 622 (summarizing the variety of changes that have made it more difficult to certify a class).



